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No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1985

LEEBRO MANAGEMENT, INC.
D/B/A SAMSON BUICK, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS OF THE THIRD CIRCUIT.

PETITION FOR A WRIT OF CERTIORARI ON BEHALF OF LEEBRO MANAGEMENT, INC.

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Statement of the Questions Presented for Review

A. Is the National Labor Relations Board obligated to dismiss a representation petition in accordance with the Board's long established contract bar rule where a union at a time other than during the Board-sanctioned 90 to 60 day window period, filed a representation petition for a proposed bargaining unit which encompasses employees in a pre-existing bargaining unit who are covered by a valid collective bargaining agreement and who are represented by a second union?

B. Must a union-filed reresentation petition be dismissed by the National Labor Relations Board when it names, as the respondent employer, a corporate entity which does not meet the statutory, National Labor Relations Board or judicial definition of employer at the time the representation petition was filed?

C. When a representation petition is filed with the National Labor Relations Board that names, as the respondent employer, a corporate entity which does not employ the employees sought to be represented by the union which filed the petition, is the National Labor Relations Board compelled to dismiss said petition?

D. Should the Supreme Court of the United States reverse the enforcement order of the Third Circuit Court of Appeals finding that Petitioner violated the Labor Management Relations Act, as amended, when that enforcement order is in conflict with established precedent of the National Labor Relations Board, other Circuit Courts of Appeal, and previous decisions of the Third Circuit, and no rationale is given for that departure from precedent?

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Opinions Below

The Opinion and Order of the National Labor Relations Board dated July 23, 1984, at Case No. 6-CA-17106, is reported at 271 NLRB No. 63, 117 LRRM 1344 (1984) and printed herein at page 5a.

The Judgment Order of the United States Court of Appeals for the Third Circuit entered August 6, 1985 is not reported but is printed herein at page 1a.

The Order Denying Petition for Rehearing, United States Court of Appeals for the Third Circuit, dated September 12, 1985 is not reported but is printed herein at page 3a.

IN THE

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS OF THE THIRD CIRCUIT.

PETITION FOR A WRIT OF CERTIORARI ON BEHALF OF LEEBRO MANAGEMENT, INC.

Statement of Jurisdiction

The jurisdiction of this Court is based upon the following:

1. Review of the Order of the United States Court of Appeals for the Third Circuit at No. 84-3734, August 6, 1985, enforcing an order of the National Labor Relations Board at Case No. 6-CA-17106, dated July 23, 1984.

2. Order of the United States Court of Appeals for the Third Circuit at No. 84-3734, dated September 12, 1985, denying the Motion for Rehearing filed by LEEBRO Management, Inc.

3. The statutory provisions of the Labor Management Relations Act, Section 10(e), as amended, 29 U.S.C. §160(e), and the Judicial Code, 28 U.S.C. §2350(a).

Statutory and Regulatory Provisions

The following statutory provisions are involved in the case:

Labor-Management Relations Act of 1947 as amended, 29 U.S.C. §141 *et seq.*

> Sec. 1.(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.
>
> It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

29 U.S.C. §151(b)

DEFINITIONS

Sec. 2. When used in this Act—

> (2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or

any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

29 U.S.C. §152(2)

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

29 U.S.C. §152(3)

Sec. 8.(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

29 U.S.C. §158(a)(1)

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

29 U.S.C. §158(a)(5)

Statement of the Case

This case is an enforcement proceeding brought by the National Labor Relations Board ("NLRB" or "Board") to enforce its Order dated July 23, 1984, in which it held that Petitioner LEEBRO Management, Inc. ("LEEBRO"), violated the Labor Management Relations Act (the "Act") by refusing to bargain with a union certified by the Board to represent its employees.

The case arises from a certification of representation issued in NLRB Case Number 6-RC-9401, certifying the United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO ("UAW") as the exclusive representative of employees of LEEBRO Management, Inc., Petitioner herein. Subsequent to that certification and order from the National Labor Relations Board, a charge of unfair labor practices alleging LEEBRO's refusal to bargain with that union was filed with the Board at NLRB Case Number 6-CA-17106. The Board's General Counsel filed a motion for summary judgment in that case on March 1, 1984, with the Board issuing a decision and order granting the motion for summary judgment on July 23, 1984. On or about November 20, 1984, the National Labor Relations Board, through its Deputy Associate General Counsel, filed an application for enforcement of its order with the United States Court of Appeals for the Third Circuit.

On August 6, 1985, the United States Court of Appeals for the Third Circuit entered an order enforcing the Board's Order. A timely Petition for Rehearing was filed, and the Third Circuit denied the Petition by Order dated September 12, 1985.

Statement of the Facts

This is an application for enforcement brought by the National Labor Relations Board seeking enforcement of its order finding that LEEBRO Management, Inc. violated the provisions of the Labor Management Relations Act by refusing to bargain with a union for which a certification of exclusive representative was issued.

LEEBRO contends that the underlying certification of the bargaining representative is invalid, and therefore, the unfair labor practice finding by the Board was invalid. Therefore, a review of the facts concerning the representation petition is essential to disposition of this case.

LEEBRO Management, Inc., is a Pennsylvania corporation which, since September 1, 1983, has been operating and doing business as Samson Buick Company, a Buick automobile dealership offering sales and leasing of new and used automobiles, service and parts sales.

At the time of and prior to the filing of the representation petition in Case 6-RC-9104, the underlying representation case, the dealership was owned and operated by Samson Buick Company, Inc., a Pennsylvania corporation. LEEBRO, its owners, directors and officers had no connection whatsoever with Samson Buick Company, Inc. For a number of years prior to the filing of the petition, a unit of employees at Samson Buick Company, Inc., consisting of full time mechanics and apprentice mechanics, was represented by the Associated Trades and Crafts Union ("ATCU").

Samson Buick Company, Inc. and the ATCU had entered into a series of collective bargaining agreements during that period. The last of those agreements was executed March 31, 1981, and was due to expire under

its own terms on March 31, 1983. However, the contract was extended for a period of one year under an automatic renewal clause contained in the agreement. Therefore, the expiration date of that contract was March 31, 1984.[1]

Prior to September 1, 1983, Samson Buick Company, Inc., entered into arms-length negotiations with LEEBRO, for the sale and purchase of the assets of Samson Buick Company, Inc. Those negotiations culminated in an actual sale and transfer of all of the assets of Samson Buick Company, Inc. to LEEBRO Management. Under the terms of the asset purchase agreement and other sales documents, LEEBRO was to take actual possession and operating responsibility for the business effective September 1, 1983.

Pursuant to the terms of that agreement, LEEBRO in fact did purchase the assets of Samson Buick Company, Inc. Although the closing took place on August 29 and 30, 1983, LEEBRO did not take possession of the assets or control of the operations until September 1, 1983, as provided for in the parties agreement.

On August 31, 1983, the day of the filing of the petition by the UAW, LEEBRO had no ownership, control or authority with regard to the employees, the assets or the operation of Samson Buick Company, Inc. LEEBRO had no financial control or interest in the receipts or any other business interest in the dealership on August 31, 1983.

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[1] The UAW had previously attempted to organize employees of Samson Buick Company, Inc. at NLRB Case No. 6-RC-9359. That petition was dismissed upon the Board's finding that the ATCU agreement with Samson Buick Company, Inc. was automatically extended to March 31, 1984, thus barring the UAW's petition under the Board's "contract bar" rules.

On that date, LEEBRO's only employees were John A. Lee, Jr., its president, and Richard Lee, John's brother and soon to be used car manager. Neither John Lee nor Richard Lee were eligible for union membership because they are both classified as supervisors (29 U.S.C. §152(3)). No employees who were eligible to vote in an NLRB election or for union membership were hired by LEEBRO until September 1, 1983, at which time ownership and control of the assets of Samson Buick Company, Inc., was assumed by LEEBRO.

LEEBRO and Samson Buick Company, Inc. were, at all times, separate and distinct entities, with no common ownership or control and no interrelationship between principals of the two corporations.

On August 31, 1983, the collective bargaining agreement between Samson Buick Company, Inc. and the ATCU was still in effect and had not been repudiated by either party.

On August 31, 1983, the UAW filed its representation petition, seeking to represent a unit of employees of LEEBRO, including those employees which were in the pre-existing bargaining unit represented by the ATCU.[2]

Following the filing of the petition, the National Labor Relations Board held a hearing on September 26, 1983, for the purpose of receiving evidence on the representation petition. At the hearing, the above facts were established.

Following the hearing, on October 25, 1983, the Acting Regional Director of Region 6 of the National Labor Relations Board issued a Decision and Direction of Election. In that decision, the Acting Regional Director

[2] Although the petition indicates that the employer is Samson Buick Co. (Lee Brothers, Inc.), the petition was amended at the hearing to reflect the correct name of LEEBRO Management, Inc.

concluded that the petition was timely filed, that there was a sufficient showing of interest among employees in the proposed bargaining unit, that the proposed unit was an appropriate unit for collective bargaining, and directed that an election be held among the employees recited in the petition. A timely request for review of the Regional Director's decision was filed by LEEBRO on November 4, 1983, and denied by the National Labor Relations Board on November 28, 1983.

On November 30, 1983, an election was held among the employees of LEEBRO in the proposed bargaining unit. The employees split their votes among the ATCU, the UAW and no representative, but the majority voted for the UAW. On December 8, 1983, the National Labor Relations Board issued a certification of representative, certifying the UAW as the exclusive bargaining representative for the employees in the bargaining unit.

Following that certification, LEEBRO continually maintained that the certification was invalid, due to the untimely filing of the representation petition by the UAW and the bar of the pre-existing collective bargaining agreement between its predecessor, Samson Buick Company, Inc., and the ATCU. LEEBRO, therefore, refused to bargain with the UAW until such time as review of the underlying certification could be obtained.

On February 10, 1984, a charge of unfair practices was filed by the UAW and docketed at case number 6-CA-17106. A complaint was issued upon that charge on February 23, 1984. That complaint alleged that LEEBRO had refused to bargain with a properly certified bargaining representative of the employees. LEEBRO's answer to the complaint, filed February 28, 1984, admitted the refusal to bargain, but denied that the certification issued by the Board was valid and denied it committed an unfair labor practice.

On March 1, 1984, counsel for the Board's General Counsel filed a Motion for Summary Judgment, which was granted by Decision and Order from the National Labor Relations Board on July 23, 1984. Subsequent to issuance of that order, LEEBRO continued to refuse to bargain with the UAW, upon the grounds that the certification of the UAW was invalid. On November 20, 1984, the National Labor Relations Board's general counsel filed an Application for Enforcement of its order with the United States Court of Appeals for the Third Circuit.

Following the filing of briefs and presentation of argument, the Third Circuit entered an order on August 6, 1985 enforcing, without explanation, the NLRB order. Following a Petition for Rehearing filed by LEEBRO, the Court on September 12, 1985, denied rehearing.

The matter is now presented to your Honorable Court upon a Petition for Writ of Certiorari.

ARGUMENT

The NLRB and the Third Circuit Court of Appeals have in this case sanctioned a union's representation efforts which are totally at odds with both the Labor Management Relations Act (the "Act") and the established precedent of both the Board and the Courts. This Honorable Court has never issued a definitive ruling upon the issues here presented, which to counsel's knowledge, present a unique situation requiring this Court's guidance in the balancing of the rights of employees, employee representatives and employers in a rival union representation setting. For these reasons it is important that this Court review this question of Federal Labor Law.

A. The NLRB and Lower Court Erred in Failing to Dismiss a Representation Petition Which Was Barred by the Existence of a Valid Collective Bargaining Agreement.

It is well established that the purpose of the Labor Management Relations Act of 1947 is to minimize industrial strife and to provide orderly and peaceful procedures for resolving disputes between labor and management. 29 U.S.C. §151(b). Moreover, the Board and the courts are charged with the duty of applying and interpreting the Act to achieve stability of labor relations and encourage peaceful resolution of disputes. *Brockway Motor Trucks vs. NLRB*, 582 F.2d 720 (3d Cir. 1978); *NLRB vs. Appleton Electric Company*, 296 F.2d 202 (7th Cir. 1961).

In its interpretation of these Congressional mandates, the Board has determined that a written and binding collective bargaining agreement, covering substantial terms and conditions of employment and encompassing

an appropriate bargaining unit operates as a bar to a petition for certification as a representative by a rival union. *Appalachian Shale Products Company*, 121 NLRB 1160, 42 LRRM 1506 (1958). With certain exceptions not relevant to this proceeding, the Board has since 1958 consistently applied this so-called "contract bar rule."

One of the most notable exceptions to this rule, and the only one germane to the case at issue, is the "window period," which provides that a petition for representation by a rival union may only be filed at a time which is more than 60 but less than 90 days before the expiration date of the existing contract. Any petition filed at any other time during the pre-existing contract's term is untimely. *Leonard Wholesale Meats, Inc.*, 136 NLRB 1000, 49 LRRM 1901 (1962); *Deluxe Metal Furniture Company*, 121 NLRB 995, 42 LRRM 1470 (1958). This concept of the "window period" has been accepted and consistently applied by both the Board and the courts since its inception. *See, e.g., Retired Persons Pharmacy vs. NLRB*, 519 F.2d 486 (2d Cir. 1975); *NLRB vs. Bayliss Trucking Corporation*, 432 F.2d 1025 (2d Cir. 1970); *Bally Case and Cooler, Inc. vs. NLRB*, 416 F.2d 902 (6th Cir. 1969).

Applying both the basic contract bar rule and the window period enunciated above to the facts of this case clearly shows that the Board, and the Court of Appeals for the Third Circuit, failed to apply this principle in a fashion consistent with the established precedent.

On August 31, 1983, the date upon which the representation petition was filed, the predecessor owner of the automobile dealership was still in power, still operating the business, and its employees were still governed by the terms and conditions of the collective bargaining agreement with the Associated Trades and

Crafts Union, which agreement did not expire until March 31, 1984. Indeed, the Board's acting Regional Director in the Decision and Direction of Election, specifically found that the representation petition was filed at a time when a collective bargaining agreement was in full force and effect.

Therefore, under the uncontradicted precedent of the Board's prior holdings, it is clear that no petition could be entertained by the NLRB on August 31, 1983, since there was a validly existing collective bargaining agreement, and the petition was filed prior to 90 days before the expiration of that agreement. There is nothing to the contrary in the record or in the decisional law of the NLRB, the Circuit Courts or This Honorable Court to lead to a contrary conclusion.

The Circuit Courts of Appeal and this Court have repeatedly held that while the NLRB has considerable latitude and discretion to establish parameters for representation matters, once established, those policies must be followed until such time as they are modified or eliminated. *Monmouth Medical Center v. NLRB*, 604 F.2d 820 (3d Cir. 1979); *NLRB v. Osborn Transportation, Inc.*, 489 F.2d 1275 (5th Cir. 1979); *NLRB v. A.J. Tower Co.*, 329 U.S. 324 (1946). However, in *NLRB v. Metropolitan Life Insurance Co.*, 380 U.S. 438 (1965), this Court noted that, when the Board reaches a conclusion which is different from that in prior cases, the "reasons for the decisions in and distinctions among these cases" must be given to eliminate the appearance of arbitrariness. *Id.* at 442; *accord, Memorial Hospital of Roxborough v. NLRB*, 545 F.2d 351, 357 (3d Cir. 1976). It is the responsibility of the reviewing court to ensure that the Board's action is both reasonable and consistent with the Act. *Universal Camera Corporation v. NLRB*, 340 U.S. 474 (1951).

Neither the Board nor the Third Circuit gave any rationale for the departure from the clearly established Board precedent, and made no attempt to overrule or justify overruling the pre-existing decisions. The finding that the petition was timely and the subsequent certification of the UAW as the exclusive representative of the employees during the term of a valid contract is a complete departure from Board precedent and attempts, *sub silentio*, to overturn years of established principles.

The Board has taken the position, and presumably the Court of Appeals for the Third Circuit has approved, that the acceptance of the untimely filed petition is a *de minimus* departure from the contract bar rule. However, the policy for that rule must be examined prior to this Court sanctioning such a departure from it.

The foundation of the contract bar rule, as noted above, is the need to preserve stability during the term of an existing collective bargaining agreement. *See, e.g., NLRB vs. Bob's Big Boy Family Restaurants*, 693 F.2d 904 (9th Cir. 1982).[3] Since the NLRB created the contract bar rule, it is able to modify it in the exercise of its discretion. *NLRB vs. Campbell Products Department*, 623 F.2d 876 (3d Cir. 1980). Nevertheless, that discretion must be utilized to apply the principle in a fashion to effectuate its policy underpinnings, and also to be consistent with the other policies of the Act. Stability of labor relations cannot be sacrificed under the guise of preserving employee freedom of choice. *NLRB vs. Circle A & W Products Company*, 647 F.2d 924 (9th Cir. 1981).

[3] The filing of a representation petition some seven months prior to expiration of an existing agreement serves to disrupt labor relations at a time when no conflict exists during the life of the agreement.

The Ninth Circuit in *Circle A & W* properly noted that:

> The policy of preserving industrial stability is of sufficient importance that the Board is required to implement the contract bar rule to protect the employer's rights as well as those of the employees. . . . Where the objectives of contract stability and adequate employee representation conflict, the Board must exercise its discretion to reach an appropriate balance, but it must give explicit recognition to both sides of this balance.

Id. at 926.

In the instant case, the Board's unreasoned departure from the contract bar rule does not balance the interests of the employee and employer in order to effectuate the policy of the Act. Indeed, by disregarding the untimely filing of the petition, the Board places at issue questions concerning representation which otherwise would never have arisen had the petition been properly dismissed as untimely. Since established precedent holds that a petition filed more than 90 days before the expiration date of an existing collective bargaining agreement does not mature on the 90th day, *Midway Lincoln Mercury, Inc.*, 180 NLRB 58, 72 LRRM 1575 (1969), some rationale for this departure must be given by the Board. None has been provided.

To permit such departure from this rule can only do harm to the basis for the contract bar rule. If the untimely filing of a petition is waived as only a *de minimus* departure, no guidance is given as to when an untimely petition becomes impermissible. The purpose for the contract bar rule can only be served by its strictest application, and the Board, until this case, has so applied it even if it resulted in dismissal of a petition filed a brief period before the window period. Such consistency is desirable, especially in light of the fact

that an appropriate remedy for a rival union is merely to withdraw the petition, and file it in a timely fashion during the window period.

Further, the Board's radical departure from its prior holdings and those of the Courts of Appeal totally fails to consider the interest of the employer in this situation. The instant case represents a new employer purchasing an ongoing business with the expectation that a collective bargaining agreement would continue until the date of its expiration. If a new employer must concentrate its efforts on settling disputes between two or more rival unions and its employees, rather than concentrating upon building its new enterprise, the chances of that business's survival are substantially lessened. It cannot be the policy of the Labor Management Relations Act to lessen the chances of survival of a new business, or even impeding the free transferability of an ongoing enterprise by creating the potential for chaos in employee relations.

In sum, the decision of the NLRB as enforced by the Third Circuit Court of Appeals simply departs radically from the established precedent of both the Board and the other Courts of Appeal as to the time limits of filing of representation petitions. This departure is not explained, and indeed may not be explained, by reference to effectuating the underlying policies of the Act. Rather, it evinces a complete disregard for both the underlying policy of the contract bar rule, as well as the interest of the Congress in stability of labor relations. This departure from the long standing rule is in conflict with other Circuits and has never been sanctioned by this Court. Therefore, this ruling justifies review and guidance by this United States Supreme Court for both the NLRB and Courts of Appeal.

B. The NLRB Decision Ignores the Statutorily Mandated Definition of "Employer" and Jurisdiction of the NLRB.

The ruling of the [illegible], and the approval of it by the Court of Appeals for the Third Circuit, goes far beyond the mere creation of a new and unjustified exception to the contract bar rule. It further stretches beyond reason the definition of "employer" as contained in the Act, both as it applies to the ability of a union to represent employees of an employer, as well as the NLRB's ability to hear a case involving a business entity which does not meet that statutory definition.

The Act contains a specific definition of employer, which has been interpreted in decisional law as encompassing both the common law and generally accepted interpretation of that term. *NLRB vs. E. C. Atkins and Company*, 331 U.S. 398 (1947). It is a mere common sense interpretation of that term that in order for one to be an employer, one must have employees who are covered by the Act. Note that supervisors and corporate officers are excluded by the Act and Board from the definition of employees. Section 2(3) of the Act, 29 U.S.C. §152(3); *NLRB v. Textron, Inc.*, 416 U.S. 267 (1975). In *NLRB vs. New Madrid Manufacturing Company*, 215 F.2d 908 (8th Cir. 1954), the Eighth Circuit Court of Appeals defined the term to encompass "anyone who owns, or who engages in operating, for himself, *a business having employees* is an employer". 215 F.2d at 913 (emphasis supplied).

However, the NLRB and the Third Circuit Court of Appeals, in this case, have totally ignored the Congressionally-mandated definition, as well as the common sense interpretation of this term, by

interpreting "employer" to mean not merely one who has employees, but one who, at some point in the future, may have employees.

A review of the factual history of this case clearly shows that, on the date the representation petition was filed by the UAW, August 31, 1985, LEEBRO Management, Inc., had absolutely no employees whatsoever within the classes of the bargaining unit which the union sought to represent. This raises two important considerations.

First, in order for a union to represent employees of an employer, there must necessarily be both an employer and some employees to represent. In the instant case, at the time the petition was filed there were neither employees nor an employer in existence. To suggest otherwise completely ignores both the record and the facts as they existed on that date and the definitions in the Act.

Second, since LEEBRO, on August 31, 1983, was not within the definition of employer, the NLRB simply had no jurisdiction over the parties.

The implications of the Board's disregard for the statute are legion. A union would be free to file petitions for representation or certification long before the sale of a business goes into effect or, conceivably, before a new business starts into operation. Such petitions, filed before the Board has jurisdiction over the parties and the business entity has any employees, would simply be permitted to ripen over the passage of time, to be acted upon by the Board when and if the business entity comes within the definition and jurisdictional standards

for the Board to act. This certainly is not the Congressionally mandated purpose for the Act or the National Labor Relations Board itself. By thus putting unions and employers-to-be within the Act, chaos will surely result.

If this Third Circuit enforcement order is permitted to stand, the Board and Courts will be attempting to decide how long before the time an entity has employees may a union file a petition. Here the Board ruled that one day was *de minimus*. Would 36 hours, two days, a week, a month, a year be likewise classified? The Board and Courts have many important matters to determine and the preceding question is not one of them.

The former rule that a petition for representation cannot be filed until a business entity becomes an employer by actually employing employees in the categories for which the union is petitioning should be restored by this Court.

The Board apparently relied upon the fact that LEEBRO Management, Inc. may have been a "successor employer" to the previous owner, and therefore, found the petition to be acceptable. The Board's reasoning jumps from the finding of "successor employer" to the conclusion that the pre-existing collective bargaining agreement was removed as a bar, because successor employers are not bound by the terms of an agreement negotiated by the predecessor employer. *NLRB v. Burns International Security Service, Inc.*, 406 U.S. 272, 281 (1972). However, such a rationale glosses over the uncontroverted facts in this matter. In the leading case concerning successor employers, the NLRB clearly stated that "*assumption of the operations* by a purchaser in good faith who had not bound himself to assume the bargaining agreement of the prior owner of the

establishment removes the contract as a bar." *General Extrusion Company*, 121 NLRB 1165, 42 LRRM 1508 (1958) (emphasis supplied).

It is significant that in this leading case, the Board did not use the terms "agreement to purchase" or "execution of documents," but rather chose to utilize the term "assumption of the operations", indicating that a pre-existing contract is removed as a bar only at the time the purchaser actually takes over operation of the business, rather than at some prior moment.

The NLRB's rationale then, is clearly without foundation since, at the time the petition was filed, LEEBRO Management, Inc., was not an employer or successor and did not become such until it "assumed the operations" on September 1, 1983.

The NLRB's order which was affirmed and enforced by the Court of Appeals for the Third Circuit departs substantially from the Congressionally-mandated definitions of employer and employee, and serves to throw the question of jurisdiction and power of the Board into chaos. The only manner in which this chaos can be avoided is by the strict application of the statutory and decisional law in the fashion in which it has been applied since the enactment of the Act. Clearly, the Board has gone far beyond the enforcement of the Act, and it is seeking to redefine its own jurisdiction and authority to act. Irrespective of whether the Board perceives the result of a strict interpretation of the law as just or unjust in this particular instance, it may not depart from its statutory authority in attempting to expand its jurisdiction. Such a departure as evidenced in this matter requires intervention and supervision of this Court to avoid incongruous and absurd results in the future.

Conclusion

The instant case presents an application of statutory, NLRB and appeliate court law to a series of facts which are not in dispute. There is no question that the petition for representation was filed at a time when a valid collective bargaining agreement existed between a union and an employer, which operated as a total and complete bar to that petition. Moveover, the entity alleged to be an employer in that petition was not within the Act's definition of "employer" at the time of the filing. Neither did that entity have any employees within the requested bargaining unit. The sole logical conclusion is that this petition was wholly invalid and should not have been processed by the NLRB. The certification of representative is unlawful and the finding of an unfair labor practice is totally without factual or legal support.

However, the impact and importance of this order of the Board reaches far beyond the parties and the facts of the instant case before this Honorable Court. Enforcement of the NLRB order will have severe repercussions against a pre-existing union's right to continued representation of employees of a successor, the sanctity of collective bargaining agreements, the employer's financial and operational abilities based upon stability and employee relations, employees' confidence in the collective bargaining and representation process, stability in relationships between unions, employees and employers, and finality and uniformity of application of established Board policies and precedent.

This is not merely a simple case of a union missing a filing deadline. The decision goes to the very heart of orderly employer-employee relations and proper procedure within statutory confines before the administrative agency responsible for enforcing the rights of all parties to that relationship.

For the foregoing reasons, LEEBRO Management, Inc., respectfully requests an opportunity for this Court to hear and rule upon these crucial Federal Labor Law issues. The fundamental nature of the questions presented and their disrupting impact as well as the conflict among the Circuit Courts is ample justification for this Honorable Court to review this decision.

It is respectfully urged that this Court issue a Writ of Certiorari to the Court of Appeals for the Third Circuit in order to review this matter upon the merits.

Respectfully submitted,

TUCKER ARENSBERG, P.C.
HENRY W. EWALT
Attorneys for Petitioner

APPENDIX

Judgment Order of the United States Court of Appeals for the Third Circuit, dated August 6, 1985

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 84-3734

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

LEEBRO MANAGEMENT, INC., d/b/a
SAMSON BUICK, INC.,
Respondent.

On Application for Enforcement of a Decision and Order of the National Labor Relations Board
Board No. 6-CA-17106

Argued: Friday, July 19, 1985

Before: SEITZ, HIGGINBOTHAM and SLOVITER,
Circuit Judges

Appendix—Judgment Order of the United States Court of Appeals for the Third Circuit, dated August 6, 1985.

JUDGMENT ORDER

After consideration of all contentions raised by petitioner, it is

ADJUDGED, ORDERED and DECREED that the order of the National Labor Relations Board be enforced in full.

Each party to bear own costs.

BY THE COURT,
A. LEON HIGGINBOTHAM
Circuit Judge

Attest:
Sally Mrvos, Clerk
DATED: AUG 6 1985

Certified as a true copy and reissued in lieu of a formal mandate on September 20, 1985.

Test: N. Elizabeth Ferguson
Chief Deputy Clerk,
U.S. Court of Appeals for the Third Circuit
COPY

Order Denying Petition for Rehearing, United States Court of Appeals for the Third Circuit, dated September 12, 1985

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 84-3734

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

LEEBRO MANAGEMENT, INC., d/b/a
SAMSON BUICK, INC.,
Respondent.

SUR PETITION FOR REHEARING

Before: ALDISERT, *Chief Judge,* SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, *Circuit Judges.*

The petition for rehearing filed by Leebro Management, Inc., Respondent in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for

Appendix—Order Denying Petition for Rehearing, United States Court of Appeals for the Third Circuit, dated September 12, 1985.

rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *in banc*, the petition for rehearing is denied.

BY THE COURT,
A. LEON HIGGINBOTHAM
Circuit Judge

Dated: SEP 12 1985

Decision and Order of the National Labor Relations Board in Case 6-CA-17106, dated July 23, 1984

DZH

271 NLRB No. 63

D-1970
Pittsburgh, PA

UNITED STATES OF AMERICA
Before the National Labor Relations Board

LEEBRO MANAGEMENT, INC. d/b/a
SAMSON BUICK, INC.,

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW).

Case 6-CA-17106

DECISION AND ORDER

Upon a charge filed by the Union 10 February 1984, the General Counsel of the National Labor Relations Board issued a complaint 23 February 1984 against the Company, the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act.

The complaint alleges that on 9 December 1983, following a Board election in Case 6-RC-9401, the Union was certified as the exclusive collective bargaining representative of the Company's employees in the unit found appropriate. (Official notice is taken of the

"record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g), amended Sept. 9, 1981, 46 Fed.Reg. 45922 (1981); *Frontier Hotel*, 265 NLRB 343 (Nov. 9, 1982).) The complaint further alleges that since 8 February 1984 the Company has refused to bargain with the Union. On 29 February 1984 the Company filed its answer admitting in part and denying in part the allegations in the complaint.

On 5 March 1984 the General Counsel filed a Motion for Summary Judgment. On 7 March 1984 the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer to the complaint, the Company contests the validity of the Union's certification, contending that the certification was not in accordance with the Act, the Board's Rules and Regulations, or Board and court precedent. The General Counsel argues that the Company is attempting to relitigate issues which it raised or could have raised in Case 6-RC-9401, that the Company does not contend that it has any newly discovered or previously unavailable evidence, and that there are no issues of fact or law requiring a hearing. We agree with the General Counsel.

Appendix—Decision and Order of the National Labor Relations Board in Case 6-CA-17106, dated July 23, 1984.

Our review of the record herein, including the record in Case 6-RC-9401, discloses that the Union filed a representation petition 31 August 1983. On 25 October 1983 the Acting Regional Director for Region 6 issued a Decision and Direction of Election, finding that a collective-bargaining agreement between the Company's predecessor and the Associated Trades and Crafts Union did not bar the petition. On 7 November 1983 the Company filed with the Board a request for review of the Acting Regional Director's decision. The Company primarily contended that the petition was untimely filed and that the existing collective-bargaining agreement barred the petition. On 28 November 1983 the Board denied the Company's request for review. The Union won the 30 November 1983 election and was certified as the unit employees' bargaining representative 9 December 1983.

It is well settled that in the absence of newly discovered and previously unavailable evidence or special circumstances, a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues that were or could have been litigated in a prior representation proceeding. See *Pittsburgh Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941); Secs. 102.67(f) and 102.69(c) of the Board's Rules and Regulations.

All issues raised by the Company were or could have been litigated in the prior representation proceeding. The Company does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the

Company has not raised any issue that is properly litigable in this unfair labor practice proceeding. Accordingly we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

Findings of Fact

I. Jurisdiction

The Company, a Pennsylvania corporation, is engaged in the retail sale and servicing of automobiles at its facility in Pittsburgh, Pennsylvania, where it annually derives gross revenues in excess of $500,000 and purchases and receives goods and materials valued in excess of $5,000 directly from points outside the Commonwealth of Pennsylvania. We find that the Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. *The Certification*

Following the election held 30 November 1983 the Union was certified 9 December 1983 as the collective-bargaining representative of the employees in the following appropriate unit:

> All service department employees, including new car prep mechanics, new car checkers, used car lot and clean up employees, used car and customer air conditioner employees, used car conditioners, car jockeys, clean up and janitorial employees, customer service write up employees, mechanic helpers, driver

parts counterpersons, mechanics, polishers, rustproofers, body mechanics, mechanic apprentices, lubricators and technician trainees, employed by the Employer at its Pittsburgh, Pennsylvania, facility; excluding office clerical employees, salespersons and guards, professional employees and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. *Refusal to Bargain*

Since 7 February 1984 the Union has requested the Company to bargain, and since 8 February 1984 the Company has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

Conclusions of Law

By refusing on and after 8 February 1984 to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if any understanding is reached, to embody the understanding in a signed agreement.

Appendix—Decision and Order of the National Labor Relations Board in Case 6-CA-17106, dated July 23, 1984.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Leebro Management, Inc. d/b/a Samson Buick, Inc., Pittsburgh, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of

employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All service department employees, including new car prep mechanics, new car checkers, used car lot and clean up employees, used car and customer air conditioner employees, used car conditioners, car jockeys, clean up and janitorial employees, customer service write up employees, mechanic helpers, driver parts counterpersons, mechanics, polishers, rustproofers, body mechanics, mechanic apprentices, lubricators and technician trainees, employed by the Employer at its Pittsburgh, Pennsylvania, facility; excluding office clerical employees, salespersons and guards, professional employees and supervisors as defined in the Act.

(b) Post at its facility in Pittsburgh, Pennsylvania, copies of the attached notice marked "Appendix."[1] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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[1] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Appendix—Decision and Order of the National Labor Relations Board in Case 6-CA-17106, dated July 23, 1984.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. 23 July 1984.

DONALD L. DOTSON, *Chairman*

DON A. ZIMMERMAN, *Member*

ROBERT P. HUNTER, *Member*

(Seal) NATIONAL LABOR RELATIONS BOARD

Appendix—Decision and Order of the National Labor Relations Board in Case 6-CA-17106, dated July 23, 1984.

D-1970

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All service department employees, including new car prep mechanics, new car checkers, used car lot and clean up employees, used car and customer air conditioner employees, used car conditioners, car jockeys, clean up and janitorial employees, customer service write up employees, mechanic helpers, driver

Appendix—Decision and Order of the National Labor Relations Board in Case 6-CA-17106, dated July 23, 1984.

parts counterpersons, mechanics, polishers, rustproofers, body mechanics, mechanic apprentices, lubricators and technician trainees, employed by the Employer at its Pittsburgh, Pennsylvania, facility; excluding office clerical employees, salespersons and guards, professional employees and supervisors as defined in the Act.

LEEBRO MANAGEMENT, INC.
d/b/a SAMSON BUICK, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 1501 William S. Moorehead Federal Building, 1000 Liberty Avenue, Pittsburgh, Pennsylvania 15222, Telephone 412-644-2969.

Decision and Direction of Election of the Acting Regional Director, Region 6, National Labor Relations Board, dated October 25, 1983

UNITED STATES OF AMERICA
Before the National Labor Relations Board
Region Six

Case 6-RC-9401

LEEBRO MANAGEMENT, INC. d/b/a
SAMSON BUICK CO.,[1]

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO.

DECISION AND DIRECTION OF ELECTIONS

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before Thomas Stefanac, a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to the undersigned Acting Regional Director.[2]

---

[1] The name of the Employer appears as amended at the hearing.

[2] Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1717 Pennsylvania Avenue, N.W., Washington, DC 20570. This request must be received by the Board in Washington by November 7, 1983.

Appendix—Decision and Direction of Election of the Acting Regional Director, Region 6, National Labor Relations Board, dated October 25, 1983.

Upon the entire record in this case,[3] the Regional Director finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organizations involved claim to represent certain employees of the Employer.[4]

4. The Petitioner seeks to represent a unit of all service department employees, including new car prep mechanics, new car checkers, used car lot and clean up employees, used car and customer air conditioner employees, used car conditioners, car jockeys, clean up and janitorial employees, customer service write up employees, mechanic helpers, drivers, parts counter persons, mechanics, polishers, rustproofers, body mechanics, mechanic apprentices, lubricators and technician trainees employed by the Employer at its Pittsburgh, Pennsylvania location; excluding office clerical employees, sales persons, and guards, professional employees, and supervisors as defined in the

---

[3] The Employer timely filed a brief which has been duly considered by the undersigned. In addition, the Employer filed, prior to the hearing, a Motion to Dismiss the instant petition and a Brief in Support of said Motion, which were admitted into the record as Board's Exhibit 2. The Employer's Motion will be discussed *infra*.

[4] The Associated Trades and Crafts Union (hereinafter Intervenor) was permitted to intervene on the basis of its contract with the Employer.

Appendix—Decision and Direction of Election of the Acting Regional Director, Region 6, National Labor Relations Board, dated October 25, 1983.

Act and all other employees. While in agreement as to the appropriateness and scope of the petitioned-for unit, the Employer and the Intervenor assert that their collective bargaining agreement bars an election.

On December 19, 1974, the Intervenor was certified in Case 6-RC-6983 as the collective-bargaining representative of certain employees of Samson Buick Company (hereinafter Samson Buick), the predecessor of the Employer in a unit of mechanics, apprentice mechanics and body men. The Intervenor was thereafter party to successive collective-bargaining agreements with Samson Buick. Following certification, the Employer and Intervenor agreed to exclude the body men from the unit and this agreement was thereafter noted in the subsequent collective bargaining agreement. The last such collective-bargaining agreement was effective, by its terms, from March 31, 1981, to March 31, 1983. At the conclusion of the contract term, the collective bargaining agreement was automatically renewed for a one-year period or until March 31, 1984, consonant with the provisions of the agreement. The Employer contends that this agreement was in effect at the time of the filing of the instant petition on August 31, 1983, and that, therefore, the agreement acts as a bar to the petition. The Employer further contends that as of August 31, 1983, when the petition was filed, it had no employees and was not an employer and that, therefore, the petition was prematurely filed. On these bases, the Employer moves for the dismissal of the petition. The Intervenor is in agreement with the Employer.

Appendix—Decision and Direction of Election of the Acting Regional Director, Region 6, National Labor Relations Board, dated October 25, 1983.

The Employer, a Pennsylvania corporation with its principal office located in Pittsburgh, Pennsylvania, is engaged in the retail sale of new and used automobiles and the service of automobiles. These business operations commenced on September 1, 1983.[5]

On May 27, 1983, the Employer executed a purchase agreement with Samson Buick, which was contingent upon the Employer being granted a franchise of the Buick Motor Division and which sale was to be effective September 1, 1983. Between approximately August 10 and August 15, 1983, the Employer received approval of its franchise application and also received necessary financing commitments. The closing on the purchase agreement took place on August 29 and 30, 1983, with an effective date of the Employer's assumption of Samson Buick's business of September 1, 1983.

The Employer commenced its operations on September 1, 1983, with all the same employees and supervision as Samson Buick. There is no common ownership between Samson Buick and the Employer. Prior to September 1, 1983, the shareholders of the Employer, including John E. Lee, Jr., who is the chief operating officer of the Employer, had no ownership in Samson Buick and had no control of the employees and supervisors of Samson Buick.

On August 25, 1983, Lee sent a letter to Thomas Farrington, business agent of the Intervenor, in which he informed Farrington of the Employer's purchase of the

[5] All parties stipulated that based on a projection of its operations for the 12-month period beginning September 1, 1983, the Employer would satisfy the Board's standards for the assertion of jurisdiction.

assets of Samson Buick and in which he requested that Farrington call Lee subsequent to September 1, 1983, to arrange a meeting. Subsequent to September 1, 1983, the Employer and Intervenor unsuccessfully attempted to schedule a meeting. The Employer then sent a telegram to the Intervenor on September 7, 1983, in which it agreed to continue to abide by the terms and conditions of the collective-bargaining agreement which was in existence between the Intervenor and Samson Buick. By letter dated September 9, 1983, Farrington informed Lee that the Intervenor also intended to abide by all the terms and conditions of the collective-bargaining agreement between the Intervenor and Samson Buick. On September 13, 1983, the Intervenor and the Employer executed an "Agreement" in which they agreed to assume and adopt the aforementioned collective-bargaining agreement, until March 31, 1984. Since September 1, 1983, the Employer has continued all terms and conditions of employment contained in said collective-bargaining agreement.

Based upon the above and the record as a whole, I find that the Intervenor's contract is not a bar to the instant petition. In reaching this conclusion, I note that it is well-settled that a successor employer is not bound by the collective-bargaining agreement of the predecessor employer. *N.L.R.B. v. Burns International Security Services, Inc.*, 404 U.S. 822 (1972). Furthermore, the assumption of operations by a purchaser in good faith, which has not bound itself to assume the predecessor's contract, removes the contract as a bar to a petition. *General Extrusion Company, Inc.*, 121 NLRB 1165 (1958). Indeed, even when a successor has informed the

predecessor employer of its intention to continue the contract and even where the successor has continued to abide by the terms and conditions of the predecessor's contract, there can be no contract bar until an agreement is reached in writing. *Great Atlantic & Pacific Tea Company*, 197 NLRB 922 (1972); *Joseph Madruga et al., d/b/a Dominator*, 162 NLRB 1514 (1967). Inasmuch as the Employer herein did not enter into any written agreement with the Intervenor until September 13, 1982, and inasmuch as there is no evidence of any other expressed written adoption of the contract in question by the Employer, I do not find that the agreement between the Employer and Intervenor constitutes a contract bar.

There remains for consideration the contention that the instant petition was prematurely filed inasmuch as the Employer did not begin operations until one day after the filing of the petition herein. As previously noted, the contract between Samson Buick and the Intervenor was in effect on August 31, 1983, the date the petition was filed herein. Also, the Employer did not physically and formally begin its actual business operations until September 1, 1983, and, therefore, the petition was filed at a time when the predecessor was still in existence and at a time when the Employer had not physically taken over the predecessor's operations. In the circumstances of this case, however, I do not find it appropriate to elevate, in effect, form over substance and dismiss the petition on these bases. In this regard, I note that the purchase agreement was executed in May 1983, that the closing on the sales agreement between the predecessor and the Employer occurred on August 29 and 30, 1983, and that the Petitioner could not be expected to know

the precise time that the sales agreement would take effect. I further note that the Employer hired all the employees and supervisors of the predecessor. In these circumstances, I do not find that it would effectuate the policies of the Act to dismiss the petition herein.

Inasmuch as I have concluded that the Intervenor's contract does not constitute a bar and that the petition was properly and timely filed with respect to this Employer, I shall deny the Employer's Motion to Dismiss.

Accordingly, in accordance with the parties' stipulation that the petitioned-for unit is appropriate[6] and the Intervenor's stated desire to participate in an election in the petitioned-for unit I find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All service department employees, including new car prep mechanics, new car checkers, used car lot and clean up employees, used car and customer air conditioner employees, used car conditioners, car jockeys, clean up and janitorial employees, customer service write up employees, mechanic helpers, driver parts counterpersons, mechanics, polishers, rustproofers, body mechanics, mechanic apprentices, lubricators and technician trainees, employed by the Employer at its Pittsburgh, Pennsylvania, facility; excluding office clerical employees, salespersons and guards, professional employees and supervisors as defined in the Act and all other employees.

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[6] In this regard, I note that the Board has an established practice of finding all employees of an automobile service department to be an appropriate unit. See, *e.g., Gregory Chevrolet, Inc.*, 258 NLRB 233 (1981).

Appendix—Decision and Direction of Election of the Acting Regional Director, Region 6, National Labor Relations Board, dated October 25, 1983.

DIRECTION OF ELECTION

An election by secret ballot will be conducted by the undersigned Acting Regional Director among the employees in the unit set forth, at the time and place set forth in the notice of election be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.[7] Those eligible

[7] In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that an election eligibility list, containing the names

(Footnote continued on following page)

shall vote whether or not they desire to be represented for collective bargaining by International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW); or Associated Trades & Crafts Union; or Neither.

Dated at Pittsburgh, Pennsylvania, this 25th day of October 1983.

JOHN W. HOSTLER
JOHN W. HOSTLER
Acting Regional Director, Region Six

NATIONAL LABOR RELATIONS BOARD
1501 William S. Moorhead Federal Bldg.
1000 Liberty Avenue
Pittsburgh, Pennsylvania 15222

(Footnote continued from preceding page)

and addresses of all eligible voters, must be filed by the Employer with the Regional Director within seven (7) days of the date of this Decision and Direction of Election. The Regional Director shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional office, 1501 William S. Moorhead Federal Building, 1000 Liberty Avenue, Pittsburgh, Pennsylvania 15222 on or before November 1, 1983. No extension of time to file this list may be granted, except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

Supreme Court, U.S.
FILED
JAN 13 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1015

In the Supreme Court of the United States

OCTOBER TERM, 1985

LEEBRO MANAGEMENT, INC., D/B/A SAMSON BUICK, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
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ROSEMARY M. COLLYER
General Counsel

JOHN E. HIGGINS, JR.
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NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

ROBERT C. BELL, JR.
Attorney
National Labor Relations Board
Washington, D.C. 20570

QUESTION PRESENTED

Whether, in the circumstances of this case, the Board reasonably found that a successor employer's acquisition of its predecessor's business operations removed the predecessor's collective bargaining agreement as a bar to the filing of a representation petition.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1015

LEEBRO MANAGEMENT, INC., D/B/A
SAMSON BUICK, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 1a-2a), the decision and order of the National Labor Relations Board (Pet. App. 5a-14a), and the decision and direction of election of the Board's Acting Regional Director in the underlying representation proceeding (Pet. App. 15a-23a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 6, 1985. A petition for rehearing was denied on September 12, 1985 (Pet. App. 3a-4a). The

petition for a writ of certiorari was filed on December 9, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Samson Buick Company is an automobile dealership in Pittsburgh, Pennsylvania. In 1974, the Associated Trades and Crafts Union (ATCU) was certified as the collective bargaining representative in a unit of Samson Buick's service department employees. The parties thereafter negotiated a series of collective bargaining agreements, the last of which was effective from March 31, 1981, to March 31, 1983. Upon its conclusion, the agreement was automatically renewed for a one-year term ending March 31, 1984. Pet. App. 17a.

On May 27, 1983, during the contract renewal year, petitioner agreed to purchase and assume the operations of Samson Buick, effective September 1, 1983,[1] contingent on petitioner's acquisition of a Buick franchise from General Motors. Petitioner obtained the franchise between August 10 and August 15. The closing on the purchase agreement was completed on August 29 and 30. Pet. App. 18a.

On August 31, one day after the sale closing and one day before petitioner actually was to take over operations, the United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) filed a representation petition with the Board seeking certification as the exclusive bargaining representative of petitioner's service department employees. Petitioner commenced business operations the

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[1] All dates hereafter are in 1983 unless otherwise noted.

next day, hiring all of the employees previously employed by Samson Buick. Pet. App. 17a-18a.

On September 7, petitioner informed ATCU that it intended to abide by the terms of the collective bargaining agreement between ATCU and Samson Buick, and on September 9 ATCU responded that it also would honor the agreement. On September 13, petitioner and ATCU executed a written agreement adopting the Samson Buick contract and providing that it would continue in effect until March 31, 1984. Pet. App. 18a-19a.

2. The Board's Acting Regional Director found that the UAW's representation petition had been properly filed and ordered that an election be held. Pet. App. 15a-23a. Applying the principle that "the assumption of operations by a purchaser in good faith, which has not bound itself to assume the predecessor's contract, removes the contract as a bar to a petition" (*id.* at 19a), the Acting Regional Director reasoned that petitioner, as the successor to Samson Buick, was not bound to honor Samson's labor agreement until it agreed to do so in writing on September 13, and that the contract therefore had been removed as a bar to the representation petition when petitioner took over the business at the beginning of Septembr (*id.* at 19a-20a).

The Acting Regional Director rejected petitioner's contention that the representation petition should have been dismissed as premature because it was filed on August 31, the day before petitioner actually assumed business operations. He noted that the purchase agreement and closing had been completed before the UAW filed its petition, that the UAW "could not be expected to know the precise time that the sales agreement would take effect," and that, only

one day after the petition was filed, petitioner "hired all the employees and supervisors of the predecessor." Pet. App. 20a-21a. The Acting Regional Director concluded that to dismiss the representation petition under these circumstances would "elevate, in effect, form over substance" and would not "effectuate the policies of the Act." *Ibid.* The Board denied review of the Acting Regional Director's decision. *Id.* at 7a.

3. Following an election among petitioner's service department employees in which it prevailed by a wide margin, the UAW was certified as the employees' exclusive bargaining representative on December 9. Pet. App. 7a; C.A. App. 93, 120. Petitioner thereafter refused to recognize and bargain with the UAW, prompting the union to file an unfair labor practice charge. The Board's General Counsel issued a complaint and moved for summary judgment on the ground that all of the material issues were or could have been litigated in the representation proceeding. The Board granted the General Counsel's motion, finding that petitioner had violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), and it ordered petitioner to recognize and bargain with the UAW. Pet. App. 5a-14a.

4. The court of appeals summarily enforced the Board's order. Pet. App. 1a-2a.

ARGUMENT

The court of appeals correctly rejected petitioner's factbound contention that the UAW's representation petition should have been dismissed because it was filed one day before petitioner formally commenced operations. Review of the court's unpublished judgment order is plainly unwarranted.

It is well-settled, and petitioner does not dispute, that where a successor employer has acquired a business without agreeing to assume its predecessor's collective bargaining agreement, the predecessor's contract does not bar the filing of a representation petition. *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272, 290 n.12 (1972); *Great Atlantic & Pacific Tea Co.*, 197 N.L.R.B. 922 (1972); *General Extrusion Co.*, 121 N.L.R.B. 1165, 1168 (1958).[2] Thus, petitioner apparently concedes (Pet. 18-19) that its assumption of Samson Buick's operations on September 1, 1983 removed Samson's contract as a bar to a representation petition, and a petition filed on that date would unquestionably have been valid. Petitioner's sole contention is that the Board abused its discretion by failing to dismiss the petition under the "contract bar" rule (see note 2, *supra*) because it was filed one day earlier.

Petitioner does not challenge the Board's findings that it had closed on the agreement to purchase the

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[2] Under the Board's "contract bar" doctrine, a valid and binding collective bargaining agreement generally bars a representation petition by a rival labor organization for a period of three years or the term of the contract, whichever is shorter. *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. at 290 n.12; *Leonard Wholesale Meats, Inc.*, 136 N.L.R.B. 1000, 1001 (1962).

business from Samson Buick at the time that the UAW filed its representation petition, that less than 24 hours later petitioner did in fact take over the business and hire all of its predecessor's employees, and that the UAW could not reasonably have been expected to know the precise time at which petitioner formally would commence operations. Moreover, petitioner does not suggest any manner in which it was prejudiced by the fact that the petition was filed on August 31 rather than September 1. Under these circumstances, the Board acted well within its broad discretion to "establish[] the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees," *NLRB* v. *A.J. Tower Co.*, 329 U.S. 324, 330 (1946), by refusing to dismiss the petition on the ground that it should have been filed one day later. Petitioner has cited no authority suggesting that such a harmless, de minimis departure requires that the representation petition be treated as a nullity.[3]

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[3] Petitioner's unsupported claim that the decision here will allow unions to file petitions "long before the sale of a business goes into effect" (Pet. 17), perhaps "a month [or] a year" early (Pet. 18), is without merit. The Board's decision was based on the particular circumstances of this case, in which the petition was filed on the day between closing and assumption of operations. Moreover, the Board's long-established practice is to dismiss an election petition if the union fails within 48 hours to present signed authorization cards demonstrating that at least 30% of the bargaining unit employees have authorized the union to represent them. See *NLRB* v. *Metro-Truck Body, Inc.*, 613 F.2d 746, 749-750 (9th Cir. 1979), cert. denied, 447 U.S. 905 (1980); *Mallinckrodt Chemical Works*, 200 N.L.R.B. 1 (1972); NLRB Rules and Regulations, 29 C.F.R. 101.17.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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